DUPLICATE
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Supreme Court of Missouri

en banc

STATE OF MISSOURI,
Respondent,

vs.

PATRICK E. TRIMBLE,
Appellant.

No. 62523

APPEAL FROM THE CIRCUIT COURT OF CASS COUNTY
The Honorable Robert G. Russell, Judge

The appellant, Patrick E. Trimble, was tried to a jury which found him guilty of capital murder and assessed his punishment at death. Secs. 565.001, 565.008 and 565.012, RSMo 1978. Judgment was entered accordingly and he has appealed to this Court which has exclusive appellate jurisdiction by reason of Section 3 of Article V of the Constitution of Missouri. Having reviewed and considered all errors enumerated by way of appeal and the sentence as mandated by § 565.014, RSMo 1978, the same is affirmed.

At the trial, evidence was presented from which the jury could find the following facts beyond a reasonable doubt:

The victim, Jerry James Everett, a white male, twenty years of age, had been arrested on charges of stealing a van and placed in the St. Charles County jail around October 28, 1979. Appellant, also a twenty year old white male, arrived approximately two days later to await disposition of charges of kidnapping, raping and sodomizing two nine year old girls.

The evidence shows that appellant was dissatisfied with the

prospect of serving time under the pending charges because he believed that penitentiary inmates have little use for those "up" on such charges and would make life difficult and dangerous for him. He stated, to three different inmates of the St. Charles County Jail, that he intended to "catch something bigger" and would commit a "capital murder," killing either another inmate or a guard.

Sometime during the week or so before November 12, 1979, appellant, who weighed approximately 210 lbs. and was 6'1" tall, settled upon Jerry Everett, who weighed approximately 145 lbs. and was 5'10" tall, as his victim. The evidence shows that Everett was mentally slow and may never have fully comprehended what was happening to him. Several inmates observed that he was mentally slow, and his mother testified that he had had some drug problems, had run away from home on numerous occasions, had begun to withdraw at around age 16, had become a loner and had received inpatient counseling in a hospital in Memphis, Tennessee. She also stated that he had difficulty writing and that it was unlikely that he knew his jail address. She had even had to send him the address for the home where he had lived.

On numerous occasions, appellant, with the jail's other inmates, took Everett's food after winning it in card games that the victim did not understand and could not play competently. Appellant placed burning matches between his victim's toes while he slept and at one point burned what appeared to be letters into Everett's right forearm by using a burning plastic shampoo bottle to administer this torture. Expert testimony indicated that these burns were <u>one half inch deep</u> at the autopsy.

The evidence showed that appellant treated the victim as his "punk" or homosexual partner. He forced the victim to have both oral and anal intercourse with him, compelled him to wear a "bra" around the jail for the entertainment of the other inmates, and forced him at one point to display to the other inmates a rag that had been stuffed into his anus. Appellant made his victim offer kisses to the other inmates and offered to sell him to a jail trustee for a carton

of cigarettes. He completed this pattern of torture and homosexual abuse by repeated beatings and by compelling Everett to sweep and mop the four jail cells in the block on several different occasions, following Everett around while he worked and beating him with his fists when he failed to comply.

On Sunday, November 11, appellant told Kenneth Schwab and John Rice that he intended to kill Everett to keep him from informing the authorities, when he went to court on November 13, of the sexual abuse he had suffered. This motive appears to have superseded his earlier motive because appellant devised a scheme to hide his crime rather than publish it to the penitentiary society. The day before the killing, he compelled Everett to write a suicide note to his parents, explaining that he could not live away from them and telling them not to cry for him because he had accepted the Lord into his life. The evidence showed that the victim was quite religious, having accepted Jesus into his life years before; that he spent much of his time in jail reading the Bible; and, that appellant had initially maneuvered himself into the victim's confidence by representing himself as a minister. The note was written on paper and placed in an addressed and stamped envelope, both of which the victim's mother had given him. Appellant dictated its contents after telling Donald Hill he was going to have Everett write a suicide note.

Appellant further prepared for the slaying by tying strips of towels together and had one of the inmates assist him in testing their strength. Shortly after dinner on November 12, 1979, appellant took Everett to Everett's cell and there placed a blanket around him, which he described as Everett's "dress." He told his victim that they were going to play the "hangman's game." Appellant compelled Everett to sit in front of him on the floor while appellant sat on one of the bunks with Everett's back and head braced against appellant's knees. Appellant placed a towel in his victim's mouth; and then, in the course of fifteen to twenty minutes, he strangled Everett by twisting a towel around his neck. At some point, Everett's neck was

fractured. Appellant made the remark to one inmate that it took a very long time to kill Everett.

Several inmates testified in addition to the above facts that they saw appellant trying to lift Everett's body up to where appellant had tied a strip of towel on the upper bars of the cell. None, however, ever observed Everett hanging from this towel.

Shortly after the strangulation, appellant called the inmates to his cell and told them that his plan was to make the death look like a suicide and that they were to say they were all watching t.v. when it occurred. He told them that he had connections on the outside and indicated that he would have them killed if they told on him. He then returned to Everett's cell and directed one of the inmates, John Rice, to call the guards. When they arrived, they observed appellant removing a towel from Everett's neck and appellant and Alvin Tate, who was Everett's cell mate, lifting Everett's body into the hallway. The guards ordered the inmates into their cells and unsuccessfully attempted to revive Everett. Initially, the inmates told the authorities that they had been watching t.v. and thought Everett had committed suicide. Later, however, a total of nine inmates made statements to the police investigators establishing the above facts: three who heard appellant express his intention to commit a "capital murder" to avoid going up on charges of raping, sodomizing and kidnapping children and who were released from the jail a week before the slaying; and six who were eyewitnesses to the torture, sexual abuse and strangulation.

POINT I

Appellant contends, in his first point, that the trial court erred in overruling his motion for a new trial and sentencing him to death because the jury conducted itself improperly in that its verdict that appellant should receive the death penalty was not clearly based upon a finding of a statutory aggravating circumstance.

At the trial, after the jury had returned a guilty verdict on the charge of capital murder, the court instructed the jury that it

could assess the death penalty if it found either of two aggravating circumstances: (1) that at the time of the murder of Jerry James Everett the defendant was in the lawful custody of a place of confinement; or (2) that the murder of Jerry James Everett was committed for the purpose of avoiding a lawful arrest of defendant. The jury returned the following verdict on punishment:

"We, the jury, having found the defendant Patrick E. Trimble guilty of the capital murder of Jerry James Everett, fix the defendant's punishment at death, and we designate the following aggravating circumstance or circumstances which we find beyond a reasonable doubt: that at the time of the murder of Jerry James Everett the defendant was in the lawful custody of a place of confinement and as a deterrent to further acts of violents [sic]." This verdict was returned at 10:14 p.m. At 10:06 p.m., the jury had sent a note to the court with the following inquiry: "The jury would like to know, if all we have to put on the verdict form is 'that at the time of the murder of Jerry Everett the defendant was in the lawful custody of a place of confinement.' We are referring to the form for the death penalty. Or do we have to go into lengthy detail." The court sent the following answer at 10:10 p.m.: "I have received your communication. I cannot make any comment or further instructions to you. I can only refer you to the instructions which you already have with you."

The question presented is whether the jury based its verdict upon a statutory aggravating circumstance or whether it exceeded the bounds of its discretion and based its verdict upon a rationale of its own devising. Appellant contends that the verdict is ambiguous on its face and that it is unclear whether the jury would have assessed the death penalty upon a finding of the designated statutory aggravating circumstance alone. He argues that this court is unable to review the action of the jury and must, therefore, find that it has acted in an arbitrary and capricious manner. We disagree.

Requiring that the jury find a statutory aggravating circumstance is designed to prevent the arbitrary and capricious imposition of

death sentences. Finding a statutory aggravating circumstance, however, is only a threshold requirement that must be met before the jury can, after considering all the evidence, recommend the death sentence. State v. Bolder, ____ S.W.2d at ____ (Emphasis added) (No. 62362, handed down July 6, 1982). The statutory aggravating circumstance is to channel the jury's discretion. The jury in the instant case affirmed the presence of the one aggravating circumstance specified in its verdict, and the evidence supports that finding. Cf. State v. Mercer, 618 S.W.2d 1, 10, n.5 (Mo. banc 1981) and State v. Robert Baker, ____ S.W.2d ____ (Mo. banc 1982) (handed down August __, 1982). In addition thereto, the jury added the words "... as a deterrent to further acts of violents [sic]." On reflection thereof, we do not find such action indicative of any arbitrary or capricious conduct and rule the same to be merely harmless surplusage. In passing, we do note that "deterrence" historically has been a permissible consideration whenever appropriate punishments for crimes have been the issue. {not esp of sentence of death + esp. not to let on except

POINT II

Appellant argues that the trial court erred in refusing his motion for a mistrial when the prosecutor referred to appellant's having been charged with rape and kidnapping in his opening and closing statements and in his examination of witnesses. He contends that the prejudicial quality of this evidence outweighed its probative value as to motive and that the trial court abused its discretion because the state had other available evidence equally probative of motive.

A criminal defendant has the right to be tried only for the crime or crimes with which he is charged, and the admission of evidence of unrelated crimes is prejudicial because it may result in a conviction founded upon crimes of which the defendant was not accused. Thus, evidence of other crimes is admissible only where it has a legitimate tendency to establish that the defendant is guilty of the immediate crime charged. Evidence thereof is admissible where it

tends to establish motive, intent, the absence of mistake or accident, a common scheme or plan embracing the commission of two or more crimes so related that proof of one tends to establish the other, or the identity of the person charged with the commission of the crime on trial.

Appellant's argument that prejudicial albeit relevant evidence should be excluded was raised in State v. Shaw, ____ S.W.2d ____ (Mo. banc 1982) (No. 62679, handed down August 2, 1982), and there we stated that relevance, not prejudice, is the touchstone of due process and that the question of whether the prejudicial effect of evidence outweighs its probative value rests within the sound discretion of the trial court. Id. at 8. We do not find that the trial court abused its discretion. Here the evidence was highly probative of material elements of the crime of capital murder, namely deliberation and premeditation; and it was probative of appellant's motive for the crime. At least ten days before the slaying, appellant had formed the intent to commit a "capital murder." Who his victim was did not particularly concern him because his motive was simply to earn the respect and fear of his prison peers and to cover the stain of having sexually abused little girls. The evidence of the prior crimes brings into sharp focus appellant's intent by illuminating his motive. This court notes, moreover, that the trial court refused to allow the state to argue the specific offenses to the jury in closing argument and instructed it to disregard the state's references to the specific crimes. While we will not say the trial court would have abused its discretion had it ruled otherwise, we do note that the trial court's conduct probably lessened whatever inflammatory impact the evidence may have had upon the jury. We find that the evidence was relevant to intent and motive and that the trial court did not abuse its sound discretion in the manner in which it allowed the jury to receive the same.

POINT III

Appellant next contends that the trial court erred in instructing

the jury that it could find as an aggravating circumstance that the capital murder had occurred while appellant was in the lawful custody of a place of confinement because the state had presented no evidence that the custody was lawful. Appellant argues that the state must prove beyond a reasonable doubt that his initial arrest and custody were lawful, e.g., that there was probable cause for his arrest. We disagree.

The meaning of "lawful custody" in § 565.012.2(9), RSMo 1978, has not been construed. Therefore, we hold that this phrase means "custody under color of law," that is, in the custody of a lawful authority. The adjective "lawful" takes as its definiendum the authority enforcing the confinement and not the custody. We agree with the state that the statute impliedly distinguishes between custody by a lawful authority and confinement by a legally unauthorized person or entity. The reasons are threefold:

First, the contrary construction would not square with other statutes and the earlier pronouncements of this court that construe those statutes. This court has recently noted in construing § 575.150.3 RSMo 1978, that it is no defense to prosecution for wounding an officer while he is actively engaged in performing his lawful duties that the arrest was without probable cause, State v. Thomas, 625 S.W.2d 115, 121 (Mo. 1981); nor is it a defense that the law that a defendant was arrested for violating was unconstitutional. Id. It is no defense to the crimes of escape or resisting arrest that the confinement was illegal. State v. Croney, 425 S.W.2d 65, 68 (Mo. 1968). §§ 575.150.3 and 575.210, RSMo 1978. State v. Croney held that: "where the imprisonment is under color of law, the prisoner is not entitled to resort to self-help but must apply for his release through regular legal channels." State v. Thomas, supra, at 122, held that because a defendant has no right to resist an unlawful arrest by a known police officer, his resistance cannot be condoned by reducing the degree of the resulting offense. Clearly, it would be no defense to capital murder that the defendant was incarcerated

unlawfully; and, it would be inconsistent with the policies and reasons underlying the above cited cases and statutes now to hold that the aggravating circumstance of a capital murder in a place of lawful confinement is negated where the underlying arrest, for example, was not lawful.

Second, a distinction between custody by a lawful authority and confinement by a legally unauthorized person is consistent with basic tort law and serves a legitimate state purpose. Where one is confined by a legally unauthorized person, one has the right of self-defense. However, one does not have the right of self-defense where custody is by a lawful authority unless the authority uses unlawful force. The policy underlying the distinction is that underlying the statutory aggravating circumstances to protect the authorities who are lawfully appointed to administrate and guard penal facilities. State v. Bolder, supra, at 12; State v. Shaw, supra, at 11.

Third, to hold to the contrary would be to render the death penalty flowing from this aggravating circumstance arbitrary and capricious because the penalty given would depend not upon the defendant's conduct or circumstances under his control, but, rather, upon the conduct of the police in making an illegal arrest or of the legislature in enacting a bad law.

We hold that the state was required to show only that the custody was under color of law and that the evidence presented was sufficient to support a finding beyond a reasonable doubt that appellant committed a capital murder while in the lawful custody of a place of confinement.

POINT IV

Appellant next argues that the judgment must be reversed and the case remanded because the state argued punishment in closing argument before the jury had determined guilt. This argument is raised for the first time on appeal--indeed, the alleged error was invited at the trial--and must be reviewed under the plain error rule, Rule 29.12(b); and "alleged errors on closing argument do not justify relief under [the plain error rule] unless they are determined to have a decisive effect on the jury." State v. Murphy, 592 S.W.2d 727, 732 (Mo. banc 1979).

Section 565.006, RSMo 1978, states that "[a]t the conclusion of all trials upon an indictment or information for capital murder heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment." MAI-CR 15.00 Supplemental Notes on Use state that "[i]f capital murder is submitted to the jury, the punishment for that offense and for any lesser included offense submitted therewith must be omitted, even though the death penalty for capital murder has been waived."

Clearly, it would have been error for the court to have instructed the jury on punishment in the guilt phase of the trial. The court, however, did not instruct on punishment, and so appellant's argument is really only an allegation that the court did not exercise adequate control of the arguments. The trial court has considerable discretion in allowing or rejecting argument of counsel, and its rulings are reversible only for abuse of discretion where argument is plainly unwarranted. State v. Moore, 620 S.W.2d 370 (Mo. 1981). Moreover, appellant must show that the abuse of that discretion prejudiced him. State v. Wood, 596 S.W.2d 394 (Mo. banc 1980), cert. denied, 449 U.S. 876 (1981).

Appellant's trial counsel indicated to the court his intention to describe the penalties in his closing argument before the jury determined guilt. In light of this court's statements in State v.

Holt, 592 S.W.2d 759, 764 (Mo. banc 1980), that a jury may properly consider punishment in choosing to convict on second degree murder rather than capital murder, appellant's request at trial was not unreasonable and the trial court did not abuse its discretion in acceding to this request. Appellant cannot now be heard to complain that the prosecutor described the penalties. That appellant's trial counsel did not actually avail himself of the opportunity is of no moment because the prosecutor could not know that appellant would state in the instruction conference that he would so argue and then not argue the point after the state had.[1]

We note, finally, upon review of the whole record that the state did not "argue" punishment. It restricted itself to a simple, declarative statement of the penalties for each degree of homicide charged. In all, the court did not abuse its discretion in acceding to the reasonable demands of counsel, and the state's argument did not prejudice appellant. Therefore, the point is denied.

POINT V

Appellant next alleges that the trial court erred in failing to strike the state's notice of evidence of aggravating circumstances because it did not give him adequate notice or opportunity to prepare. Specifically, appellant contends that a disclosure of aggravating circumstances must comply with Rule 23.01 and provide a defendant with notice of the aggravating circumstance, the specific evidence

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1. We here neither hold nor imply that the state can introduce the issue of punishment into the guilt phase of the trial where a defendant has not. State v. Holt is not a two edged sword that may be used generally to break down the bifurcated structure of a capital murder trial.

supporting that circumstance and the names and addresses of all material witnesses. We disagree.

Section 565.006.2, RSMo 1978, states that "[o]nly such evidence in aggravation as the prosecution has made known to the defendant prior to his trial shall be admissible." The statute does not state or suggest that something on the order of a separate indictment or information is required. We decline the invitation to read useless requirements into the statute. Under Rule 23.01, defendants currently receive specific notice of the crimes for which they are charged, facts constituting the offense and the time and place of the offense. Additionally, they receive notice of what witnesses will testify against them. We believe that notice of the aggravating circumstances that goes no further than the language of the statute is sufficient where the information states facts sufficient to give notice of the crime charged and contains the names of all witnesses from whom may be discovered the evidence of the aggravating circumstances. Such notice is all the process that is due even where the death penalty may be imposed. Here appellant received notice of the aggravating circumstances on June 23, 1980, a month before trial, and received the Information on January 29, 1980. Together, the notice of aggravating circumstances and the Information were sufficient notice.

POINT VI

Appellant next contends that the trial court erred in permitting three police officers to testify as to the reputation of the appellant for veracity and truthfulness. He also contends that even if such testimony was proper, it was error not to strike the witnesses' volunteered opinions as to his veracity. Since these issues are first raised on appeal, we will review them only as plain error under Rule 29.12(b). We find no error.

When a witness takes the stand, he places his reputation for truthfulness and veracity in issue and the state may then offer evidence of his general reputation for truthfulness and veracity. State v. Brookshire, 368 S.W.2d 373, 385 (Mo. 1963). Here, appellant had

testified in his own behalf, and the court did not err "plainly" or otherwise in permitting the witnesses to testify as to appellant's reputation for veracity and truthfulness.

Generally, a witness should not testify as to his opinion of the accused's character. State v. Antwine, 506 S.W.2d 397, 399 (Mo. 1974). Federal Rule 405, however, permits such evidence, and opinion evidence on veracity and truthfulness cannot be said generally to violate due process. The classic rationale of the reputation-only rule was stated in People v. Van Gaashick, 189 N.Y. 408, 82 N.E. 718 (1907); classic because it is the oft quoted answer to Wigmore's argument for the admissibility of opinion evidence of character. 7 Wigmore, Evidence § 1986 (3d ed., 1940). The thrust of Van Gaashick was that permitting opinion evidence would lead to endless inquiries into the basis of opinions and innumerable collateral disputes. This is not a due process concern except insofar as a defendant is denied due process when a jury becomes confused by collateral issues. In the case at bar, no confusion of constitutional magnitude resulted because the state itself put a stop to the witnesses' attempts to express their opinions. Thus, we cannot say that appellant suffered manifest injustice when the court did not strike the witnesses' testimony sua sponta, and the point is denied.

POINT VII

Appellant next contends that the trial court erred in not striking on its own motion the testimony of the victim's mother because it was not relevant and was inflammatory. Again, we will review this issue under the plain error rule, Rule 29.12(b), because appellant raised it on appeal for the first time. We find no error.

At the trial, appellant placed the victim's mental state in issue, testifying that he discovered Everett hanging by the neck from the bars. Additionally, a suicide note was discovered on Everett's bunk, and the state's witnesses testified that appellant stated that he would have Everett write a suicide note and that they saw him dictating to Everett as Everett wrote. The note was as follows and

was placed in a stamped envelope with return address:

"Dear Mom and Dad

I'm sorry to have to send this letter but, I can't handle the pressure of being away from You and Dad. I know I've caused you both a lot of sorry and pain. So I fell its best this way. I love you both very much, and please don't cry, because I have accepted the Lord into my life, and I know I will, go to heaven, remember me always

Your Son
Jerry Everett [sic]"

The victim's mother testified that her son had been a Christian for years and had not been converted recently as the note suggested. She stated that he had had some personal problems: he had the mental age of 12 or 13; he was a loner, having begun to withdraw at about age 16; he had had some drug problems. She testified that he had recently received counseling and appeared to be improving; that the family had recently been fishing in Canada and was planning a sailboat trip when Jerry was arrested; and, that he had enjoyed and was looking forward to these trips. Finally, the witness testified that the letter did not seem authentic because Jerry's spelling and composition were normally poor, he did not ever sign his mail, he would not know his return address and he had not lived with his parents for some time.

Questions of relevancy are left to the discretion of the trial court and its ruling will be disturbed only if an abuse of discretion is shown. State v. Wood, 596 S.W.2d 394, 402 (Mo. banc 1980). Whether potentially prejudicial or inflammatory evidence is admitted is within the trial court's discretion, and relevancy is the principal criterion. Id. at 403. Our review of the record does not show that the trial court abused its discretion, and the point is denied.

POINT VIII

In his final point, appellant levels several constitutional attacks upon §§ 565.001, 565.003, 565.006, 565.008 and 565.016, RSMo 1978. Specifically, he contends that the imposition of the death penalty is arbitrary and capricious because (1) the prosecutor has

discretion to charge capital murder in a particular case; (2) the jury has unbridled discretion because it can find a defendant not guilty of capital murder and guilty of a lesser included offense; (3) the mechanism by which the court can compare homicides committed in a jail or other penal institution is inadequate; (4) the imposition of the death penalty in this case does not implement a legitimate state interest; and (5) the death penalty has not been shown to be a deterrent. Finally, appellant argues that the statutes are vague and overbroad and violate the Equal Protection Clause.

A.

That the prosecutor has discretion in charging capital murder does not render the death penalty arbitrary and capricious, Gregg v. Georgia, 428 U.S. 153, 199 (1976), nor does the jury's discretion to acquit a defendant of capital murder and convict him of a lesser included offense. In Gregg, the United States Supreme Court stated:

> The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. Furman, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense.

Discretionary acts before the sentencing phase are irrelevant to whether the death penalty is arbitrary and capricious. Only discretionary acts that concern punishment and that occur after conviction for capital murder are relevant to this issue. Thus, the prosecutor's discretion to prosecute and the jury's discretion to acquit of capital murder are irrelevant. Similarly, the mechanism by which this court compares capital murders committed in jails or other penal institutions need not include "cases such as those in which the state chose not to charge a defendant with capital murder, the state agreed to a plea bargain whereby a defendant pled guilty to a lesser charge, the conviction was for an offense less than capital murder, or the state waived the death penalty." State v. Bolder, supra, at 16-17. And, thus, the mechanism by which this court will compare appellant's case to other capital murder cases in Missouri is adequate although it

does not compare capital murder cases with lesser degrees of homicide or with cases where no charges were brought and does not compare the treatment of defendants at the charging and plea bargaining stages.

B.

State v. Bolder, supra, at 12, stated that the legislature, in adopting § 565.012.2(9), RSMo 1978, reasonably could have concluded that the death penalty is appropriate "when imprisonment already imposed does not deter capital murder. The imposition of capital punishment is rationally related to the state's obviously legitimate interests in preventing crime and protecting other persons, such as prison employees and other inmates, with whom prisoners come in contact." Appellant argues that because he had not been convicted and was merely awaiting trial when he committed the capital murder, the legitimate purposes of the statute would not be served by imposing the death penalty. The legitimate state purpose expressed in the statute is not merely to deter capital murder in prisons where imprisonment may not, but to deter them in every case. It is not a condition precedent to the death penalty for capital murder with the aggravating circumstance that the killing was in a prison that the defendant previously had been given a life sentence. That this court has found, employing a rational basis test (see Bolder, supra, at 11) that the legislature legitimately could have considered those instances where imprisonment was not an adequate deterrent does not foreclose our finding, under a rational basis test, that the legislature legitimately could have aimed this aggravating circumstance at deterring all capital murders in any prison. The legislature may have had several reasons: deterring those otherwise undeterred; protecting prison guards who daily serve the state in a dangerous environment; and protecting other prison inmates who are relatively defenseless in the prison environment. In State v. Shaw, supra, at 16, we said that "[t]hose imprisoned for violating our laws have cast upon the state both the expense of, and the responsibility for, their safe care while in confinement."

C.

Appellant argues that the death penalty has not been shown to be a deterrent and, therefore, is cruel and unusual punishment. This question was raised and disposed of in Gregg v. Georgia, supra, at 183-88. The legislature rationally could determine that the death penalty is a deterrent. Moreover, the death penalty has other legitimate purposes, namely, incapacitation and retribution.

D.

Appellant argues, finally, that the statutes are vague and overbroad and violate Equal Protection. He offers no reason for sustaining this claim, and we see no reason to reconsider our previous holdings in State v. Newlon, 627 S.W.2d 606, 162-13 (Mo. banc 1982), petition for cert. filed, ____ U.S.L.W. ____ (U.S. May 5, 1982) (No. 816660), and State v. Bolder, supra, at 11 et. seq., which held that the aggravating circumstance for which appellant was sentenced to death does not violate the Equal Protection Clause. The point is denied.

POINT IX

Section 565.014.1 mandates that we review the death sentence where it is imposed. Section 565.014.3 provides:

> With regard to the sentence, the supreme court shall determine:
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> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and
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> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 565.012; and
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> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Our review of the entire record convinces us that the sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor.

Section 565.012.2(9), RSMo 1978, provides as a statutory aggravating circumstance that "[t]he capital murder was committed by a person in ... the lawful custody of a ... place of lawful confinement."

The jury so found, and the evidence supports its findings.

Our final consideration is whether the death penalty, taking into account both the crime and the defendant, is excessive or disproportionate to the penalty imposed in similar cases. Since the enactment of our current capital murder statute, § 565.001, this Court has reviewed and affirmed four death sentences. State v. Shaw, ____ S.W.2d ____ (Mo. banc 1982) (No. 62679, handed down August 2, 1982);[2] State v. Bolder, ___ S.W.2d ____ (Mo. banc 1982); State v. Newlon, 627 S.W.2d 606 (Mo. banc 1982), petition for cert. filed, ____ U.S.L.W. ____ (U.S. May 5, 1982) (No. 81-6660); State v. Mercer, 618 S.W.2d 1 (Mo. banc), cert. denied, 102 S. Ct. 432 (1981). We have reversed one death sentence because of its disproportionality. State v. McIlvoy, 629 S.W.2d 333 (Mo. banc 1982). In addition to Shaw, Bolder, Newlon, and Mercer, we have affirmed twelve capital cases in which the choice of death or life imprisonment without possibility of parole for fifty years was submitted to the jury. State v. Greathouse, 627 S.W.2d 592 (Mo. 1982); State v. Bostic, 625 S.W.2d 128 (Mo. 1981); State v. Thomas, 625 S.W.2d 115 (Mo. 1981); State v. Emerson, 623 S.W.2d 252 (Mo. 1981); State v. Turner, 623 S.W.2d 4 (Mo. banc 1981), cert. denied, 102 S. Ct. 1982 (1982); State v. Jensen, 621 S.W.2d 263 (Mo. 1981); State v. Baskerville, 616 S.W.2d 839 (Mo. 1981); State v. Mitchell, 611 S.W.2d 223 (Mo. banc 1981); State v. Williams, 611 S.W.2d 26 (Mo. banc 1981); State v. Royal, 610 S.W.2d 946 (Mo. banc 1981); State v. Borden, 605 S.W.2d 88 (Mo. banc 1980); State v. Downs, 593 S.W.2d 535 (Mo. 1980).

We have decided two cases in which the statutory aggravating circumstance was that the capital murder was committed by a person in the lawful custody of a place of lawful confinement. In State v. Shaw, supra, the defendant killed a corrections employee engaged in

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2. We have solicited the cases below, which we have again surveyed, from State v. Shaw, supra.

the performance of his official duty. In State v. Bolder, supra, as here, the defendant killed another inmate. We find that in exercising its discretion to impose the death penalty after finding the existence of the aggravating circumstance, the jury did not impose a sentence that was excessive or disproportionate.

It is a rare case where a defendant announces his intent to commit a "capital murder" by slaying either a guard or another inmate a week before he does so. It is rare for a defendant to commit a capital murder in order merely to rise in the estimation of his criminal peers with no particular preference as to victim. It is unparalleled that after announcing these aspirations to other inmates that a defendant should set about a week long starving, beating, burning and sexual abuse of an inmate much smaller in size than he and especially vulnerable because of age, experience and mental deficiency. The evidence shows that appellant slew his victim in the confines of a prison in the manner of an execution, and this court finds that the death penalty for appellant is neither disproportionate nor excessive.

Finding no reversible error, the judgment should be and is hereby affirmed.

J. P. MORGAN, Judge

Donnelly, C.J., Rendlen, Welliver, Higgins and Bardgett, JJ., concur; Seiler, J., concurs in result in separate opinion filed.

Execution date set for October 16, 1982.

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No. 62523

OPINION CONCURRING IN RESULT

While I doubt that the death penalty does more good than it does harm, my personal views are not important and under compulsion of the previous cases wherein this court has upheld the death penalty, I concur in the outcome of the present case.

Something should be said about the appalling lack of supervision in the St. Charles County jail which this case brings to light. One cannot read what happened to the victim without wondering how the abuse could have gone unnoticed or undiscovered by the sheriff, who is by law in charge of the jail, § 221.020, RSMo 1978, or his deputies or jailers. The abuse went on for over a week prior to the actual killing. Evidently there is no supervision whatever exercised in St. Charles County over the jail and the prisoners are free to run wild and do as they please with one another. Those who are supposed to be in charge of the jail look the other way or designate an inmate trusty as jailer, a system which leads to deplorable abuses.

What was permitted to take place in the St. Charles County jail is a public disgrace. The principal opinion speaks about the state having the responsibility for the safe care of those in confinement. That

responsibility obviously means nothing in the St. Charles County jail. "All hope abandon, ye who enter here" would be a fitting inscription for its portals, just as over the gates of Dante's Hell.

Robert E. Seiler, Judge

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI, Plaintiff-Respondent,	)	
vs.	)	No. 62523
PATRICK E. TRIMBLE, Defendant-Appellant.	)	

MOTION FOR RE-HEARING

Jurisdiction

The Court's opinion in the above captioned cause was filed on August 31, 1982. A copy of this Motion has been mailed to the Attorney General, Attorney for Respondent, and the Motion has been filed within 15 days of the opinion.

Grounds

The Appellant moves the Court to Re-Hear the above cause as the following material matters of law and fact have been overlooked and misinterpreted by the Court.

1. The Court's opinion in Point I ignores the clear guidance furnished by the United States Supreme Court cases cited by Appellant in his brief in holding that the statutory aggravating circumstance is "only a threshold requirement that must be met before the jury can, after considering all the evidence, recommend the death sentence". The specific requirement that the jury find an aggravating circumstance beyond a reasonable doubt was enacted to eliminate the arbitrary and discriminatory application of the death penalty. Gregg V. Georgia, 428 U. S. 153 (1976); Godfrey V. Georg 446 U. S. 420 (1980).

While those cases allow consideration of the circumstances surrounding the crime itself and the offender, they do not allow a jury an unbridled discretion once an aggravating circumstance is found. Rather, the aggravating circumstance must be the reason for the death penalty, and then, under Missouri law as outlined in the Instructi the jury must consider whether some factor would mitigate the imposition of a sentence of death.

The Court's opinion mistakenly compares this case to that of State V. Bolder, (No. 62362, July 6, 1982.) In Bolder the jury

added words to its verdict indicating that is was imposing a sentence of death due to the fact that Bolder was already serving a sentence of life imprisonment for committing a murder. Since that sentence had not deterred him from taking another life the death penalty was imposed.

The facts of this case are different from Bolder. The jury added to its verdict form below the words, ". . . as a deterrent to further acts of violents (sic)".

Those words go far beyond mere harmless surplusage. To the extent that Appellant may have received a sentence of death to deter others and be amde an example of, the decision of the jury would be arbitrary and capricious and clearly unjustified and unconstitutional While "deterrence" may historically have been a pemissible considération for a legislature in determining the possible ranges of punishment for any given crime, a sentence of death is clearly improper if based on that factor, where the possibility exists, as in this case, that the mere presence of an aggravating circumstance in and of itself would not have convinced the jury to impose it.

To hold as the Court's opinion that the aggravating circumstance is mere threshhold would allow the jury, once it is found, to impose a sentence of death based race, poverty, political unpopularity or any number of clearly inpermissable arbitrary and capricious factors having nothing to do with the particular offender or crime involved. The opinion of Court misinterprets the prior cases cited and misapplies the facts of Bolder to this case.

2. The Court's opinion, in determining whether the trial Court abused its discretion in allowing predudicial evidence concerning the rape and kidnapping charges on which Appellant was held the time of the alledged offense, overlooked material facts in making that determination.

The evidence presented by the State herein was that at the time of the death of Mr. Everett, he was killed by Appellant to cover up the prior abuses to which he had alledgedly been subjected. An elaborate scheme was described by the State in its evidence by which the Appellant attemted to make death look like suicide. Several State

winesses testified that they witnessed the writing of the suicide note and had been told of Appellant's intentions concerning the cover-up a long time prior to its occurrence.

The State had no problem proving motive, intent, deliberation, and premeditation. The evidence concerning Appellant's other charges would, in fact, be contradictory to the cover up motive and in that sense not help the State's case.

Clearly the only intent of the State in producing such evidence in such vivid detail was to predjudice the Appellant, which it clearly did. That predjudice is obvious not only from the jury verdict but from this Court's opinion.

The Court on four pages makes a great detailed study of the henious acts of which Appellant had been accused both in this case and the charge on which he was jailed at the time of Everett's death. The Court's opinion states, that he was in jail to "await disposition of charges of kidnapping, raping, and sodimi ing two nine year old girls'. The wording of the opinion shows the abhorance which the Court feels toward those types of acts. Clearly this Court had difficulty divorcing the legal issues from the shocking nature of the charges leveled at the Appellant. A jury in rural Missouri cannot be expected to greater ability than trained legal minds to do so. As the above facts were overlooked in the opinion, rehearing is warranted.

3. The Court overlooked material facts in its holding in Point IV allowing the State to argue the range of punishment contrai to Section 565.006 RSmo., 1978. The Court held since the Defendant' attorney stated he would mention punishment in his closing argument it was permissable for the State to do so.

The fact is, however, that the defense did not mention the ran; in the presence of the jury and could not have been held to have waived the statutory prohibition against its consideration.

The Court's opinion overlooked the fact the prosecutor mentione the ranges of punishment in the opening half of his closing argumen and not the rebuttal (T 809). If the defense was going to open the door, by mentioning punishment, any such comments by the prosecutor should have been postponed until such time as the defense did so.

As the prosecutor does have the opportunity to rebut any statements made by the defense in its closing argument, the prohibition of the statute was violated.

Whether or not the prosecutor "argued" punishment or merely stated the range, the statute was violated in that range of punishment was placed before the jury for its consideration in its deliberation as to guilt innocence. It was the fact that the jury was informed of the range and not the words with which the prosecutor did so which violate the statute and thus Court's opinion should be reconsidered.

4. In deciding Point V, the Court misinterprets a material fact concerning the sufficiency of the State's Notice of Evidence of Aggravating Circumstances. As pointed out in the Court's opinion, that Notice was not received by Appellant until June 23, 1980, a month before trial.

It is not until the Notice in Aggravation is received that the Defendant is put on Notice that the State, in fact, intends to seek the death penalty. The intention on the part of the State could change not only the strategy of the defense in the punishment phase but also in the trial itself. One months time would be insufficient to present an adequate defense to the request for a sentence of death even had the State indicated the evidence it would present. To allow the State to present evidence of Aggravating Circumstances or argue it to the jury without the particular facts on which the State intends to rely deprives the Defendant of Due Process as he is at a great disadvantage in answering them.

If., for example, the State intends to argue deterrence, the Defendant would well be advised to present evidence that capital punishment does not deter crime, but rather enhances it. There are experts in the St. Louis area who have testified at other capital murder trials in some of which the jury has rejected the death penalty. They would have been available for presentation had the Defendant, herein been adequately advised of the State's intentions concerning aggravation. To require appointed Defense Counsel on one month's notice to prepare that type of presentation, while at the same time attempting to prepare a defense to the charges themselves

is not reasonable and would deprive Defendant of adequate counsel and Due Process. Thus the opinion of this Court below, misinterprets those facts, and should be reheard.

5. The Court's opinion overlooks a material fact in affirming the decision on Point VI in that the officers who had testified to Defendant's reputation for truth and veracity were required to give no foundation for their familarity with Appellant's community reputation. This is in direct conflict with the case cited by this Court in its opinion that a witness is not allowed to give mere opinion of the accused's character.

All of the witnesses in this case attempted over defense objections to offer their personal opinion that Appellant was a chronic liar and there was no evidence produced that any of those witnesses knew anyone who was familar with Defendant or his reputation and had any knowledge of the general community opinion. Without the proper foundation as to the witnesses familarity with the reputation, the testimony becomes mere opinion and the holding of this Court otherwise erroneously applies the law to the facts herein.

Conclusion

For the foregoing reasons, it is respectfully submitted that this Court should Re-Hear the matter and reconsider its opinion previously entered.

Respectfull submitted,

Cynthia S. Holmes

CYNTHIA S. HOLMES #23033
Attorney for Appellant
915 Olive, Suite 1002
St. Louis, MO 63101

STATE OF MISSOURI)
)SS.
CITY OF ST. LOUIS)

Cynthia S. Holmes, being duly sworn and on her oath states that the foregoing Motion for Re-Hearing was served by United States Mail, postage fully pre-paid this 10 day of September, 1982 on the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102, Attorney for Respondent.

Cynthia S. Holmes

Subscribed and sworn to before me this 10 day of September, 1982.

[illegible]

My Commission Expires:
Dec. 14, 1985

No. 62523

Circuit Court No. CR-180-4FX

In the Supreme Court of Missouri

September Session, 19 82

State of Missouri, Respondent,

vs.

Patrick E. Trimble, Appellant.

Now at this day, the Court has entered the following orders in the above entitled cause:

"Appellant's motion for rehearing overruled."

"Appellant's motion for stay of execution overruled. Execution date re-set for October 28, 1982."

STATE OF MISSOURI—Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September *Session thereof, 19* 82 *, and on the* 7th *day of* October *19* 82 *, in the above entitled cause.*

Given under my hand and seal of said Court, at the City of Jefferson, this 7th *day of* October *19* 82

Thomas F. Simon *Clerk.*

Mary Elizabeth McHaney *D. C.*

Chapter 565

OFFENSES AGAINST THE PERSON

Sec.

565.001. Capital murder defined.
565.003. First degree murder defined.
565.006. Verdict as to guilt when rendered—finding of guilt, effe of—presentence hearing, admissible evidence—penalt when imposed—reversible error, effect of.
565.008. Death penalty, when imposed—life imprisonment, wh imposed—minimum of fifty years to be served, when- first and second degree murder, penalties for.
565.012. Evidence to be considered in assessing punishment in cal tal murder cases.
565.014. Supreme court to review all death sentences, notice, co tents of—findings required—assistant to supreme cou authorized, duties of.
565.016. Finding of unconstitutional provisions, effect of.
565.050. Assault in the first degree.
565.060. Assault in the second degree.
565.070. Assault in the third degree.
565.080. Consent as a defense.
565.090. Harassment.
565.100. Lack of consent in kidnapping and crimes involving re straint.
565.110. Kidnapping.
565.120. Felonious restraint.
565.130. False imprisonment.
565.140. Defenses to false imprisonment.
565.150. Interference with custody.

565.001. Capital murder defined

Any person who unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of another human being is guilty of the offense of capital murder.

L.1977, p. —, H.B.No.90, § A (§ 1), eff. May 26, 1977.

565.003. First degree murder defined

Any person who unlawfully kills another human being without a premeditated intent to cause the death of a particular individual is guilty of the offense of first degree murder if the killing was committed in the perpetration of or in the attempt to perpetrate arson, rape, robbery, burglary, or kidnapping.

L.1977, p. —, H.B.No.90, § A (§ 2), eff. May 26, 1977.

565.006. Verdict as to guilt when rendered—finding of guilt, effect of—presentence hearing, admissible evidence—penalty, when imposed—reversible error, effect of

1. At the conclusion of all trials upon an indictment or information for capital murder heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment, and by their verdict ascertain whether the defendant is guilty of capital murder, murder in the first degree, murder in the second degree, manslaughter, or is not guilty of any offense. In nonjury capital murder cases, the court shall likewise first consider a finding of guilty or not guilty without any consideration of punishment, and by its verdict ascertain, whether the defendant is guilty of capital murder, murder in the first degree, murder in the second degree, manslaughter, or is not guilty of any offense.

2. Where the jury or judge returns a verdict or finding of guilty as provided in subsection 1 of this section, the court shall resume the trial and conduct a presentence hearing before the jury or judge at which time the only issue shall be the determination of the punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas. Only such evidence in aggravation as the prosecution has made known to the defendant prior to his trial shall be admissible. The jury or judge shall also hear argument by the defendant or his counsel and the prosecuting attorney regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument to the jury or judge. Upon conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed. In capital murder cases in which the death penalty may be imposed by a jury or judge sitting without a jury, the additional procedure provided in section 565.012 shall be followed. The jury, or the judge in cases tried by a judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law; except that the judge shall in

no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment.

3. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

L.1977, p. —, H.B.No.90, § A (§ 3), eff. May 26, 1977.

565.008. Death penalty, when imposed—life imprisonment, when imposed—minimum of fifty years to be served, when—first and second degree murder, penalties for

1. Persons convicted of the offense of capital murder shall, if the judge or jury so recommends after complying with the provisions of sections 565.006 and 565.012, be punished by death. If the judge or jury does not recommend the imposition of the death penalty on a finding of guilty of capital murder, the convicted person shall be punished by imprisonment by the division of corrections during his natural life and shall not be eligible for probation or parole until he has served a minimum of fifty years of his sentence.

2. Persons convicted of murder in the first degree shall be punished by imprisonment by the division of corrections during their natural lives. Persons convicted of murder in the second degree shall be punished by imprisonment by the division of corrections for a term of not less than ten years.

L.1977, p. —, H.B.No.90, § A (§ 4), eff. May 26, 1977.

565.012. Evidence to be considered in assessing punishment in capital murder cases

1. In all cases of capital murder for which the death penalty is authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider:

(1) Any of the statutory aggravating circumstances enumerated in subsection 2 which may be supported by the evidence,

(2) Any of the statutory mitigating circumstances enumerated in subsection 3 which may be supported by the evidence,

(3) Any mitigating or aggravating circumstances otherwise authorized by law, and

(4) Whether a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death or whether a sufficient mitigating circumstance or circumstances exist

which outweigh the aggravating circumstance or circumstances found to exist.

2. Statutory aggravating circumstances shall be limited to the following:

(1) The offense was committed by a person with a prior record of conviction for capital murder, or the offense was committed by a person who has a substantial history of serious assaultive criminal convictions;

(2) The offense was committed while the offender was engaged in the commission of another capital murder;

(3) The offender by his act of capital murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of capital murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The capital murder was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, elected official or former elected official during or because of the exercise of his official duty;

(6) The offender caused or directed another to commit capital murder or committed capital murder as an agent or employee of another person;

(7) The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;

(8) The capital murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duty;

(9) The capital murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement;

(10) The capital murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

3. Statutory mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(7) The age of the defendant at the time of the crime.

4. The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt.

5. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed.

L.1977, p. —, H.B.No.90, § A (§ 5), eff. May 26, 1977.

565.014. Supreme court to review all death sentences, notice, contents of—findings required—assistant to supreme court authorized, duties of

1. Whenever the death penalty is imposed in any case, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the supreme court of Missouri. The circuit clerk of the court trying the case, within ten days after receiving the transcript, shall transmit the entire record and transcript to the supreme court together with a notice prepared by the circuit clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report by the judge shall be in the form of a standard questionnaire prepared and supplied by the supreme court of Missouri.